

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC 2002-000723

06/23/2003

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT
P. M. Espinoza
Deputy

FILED: _____

STATE OF ARIZONA

DIANA C HINZ

v.

ALLISON ANN EHLERS

NEAL W BASSETT

PHX CITY MUNICIPAL COURT
REMAND DESK-LCA-CCC

MINUTE ENTRY

PHOENIX CITY COURT

Cit. No. #5858783

Charge: 1. DUI
2. DUI W/AC OF .08 OR HIGHER
3. FAIL TO OBEY RED TRAFFIC SIGNAL

DOB: 08/06/74

DOC: 11/30/01

This Court has jurisdiction of this misdemeanor criminal appeal pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. Section 12-124(A).

This case was submitted to the Court without oral argument and the Court has considered and reviewed the record of the proceedings from the Phoenix Municipal Court, and the Memoranda of counsel.

Appellant was charged with Driving While Under the Influence of Intoxicating Liquor, a class 1 misdemeanor in violation of A.R.S. Section 28-1381(A)(1), Driving With an Alcohol
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Concentration of .08 or Higher Within Two Hours of Driving, a class 1 misdemeanor in violation of A.R.S. Section 28-1381(A)(2), and Failure to Obey a Red Traffic Signal, a civil traffic offense in violation of A.R.S. Section 28-645(A)(3)(A). During the trial, a defense witness failed to appear to testify, upon which the trial judge said to the jury:

[U]nfortunately, we had not intended to leave at 4:20. We were going to leave at 4:45. Mr. Mueller's [defense attorney] witness didn't show that was supposed to be here, so we're going to have to break early. I'm going to lean on him tomorrow; we're going to be finished tomorrow . . . I'm going to have to ride h[a]rd on both of you. But I'm not trying to abuse your time . . . we intended to get a full day out of it. We didn't get that day . . . and I apologize to you . . . for what appears to be abuse of your time. We're not trying to do that.¹

Appellant did not object to the judge's remarks and subsequently, she was convicted of all three charges.²

On appeal, Appellant seeks a new trial on the assertion that the trial judge's comments improperly prejudiced her case by violating her constitutional rights to a fair and impartial jury³ and to due process of law.⁴ An appellant, who does not object at trial to alleged judicial misconduct, cannot thereafter raise this issue on appeal unless it constitutes a fundamental error.⁵ Therefore, this Court will consider Appellant's untimely objection only in the context whether the trial judge's comments constituted a fundamental error.

Characterized as "clear, egregious, and curable only via a new trial"⁶, a fundamental error goes to the foundation of a case and denies the defendant a right essential to his defense.⁷ A violation of a constitutional provision, such as the right to a fair trial by an impartial jury, is one example.⁸ It follows that if the trial judge's comments improperly influenced the jury's verdict, as Appellant contends, a fundamental error has occurred.⁹

¹ RT p. 69-70.

² This appeal does not consider the civil traffic offense because it's verdict was rendered by the trial judge, not the jury.

³ U.S. Const. amend. VI; Ariz. Const. art. II, section 24.

⁴ U.S. Const. amend. V, XIV section 1; Ariz. Const. art. II, section 4.

⁵ State v. Thomas, 130 Ariz. 432, 636 P.2d 1214 (1981); Allied Van Lines v. Parsons, 80 Ariz. 88, 293 P.2d 430 (1956); Hurvitz v. Coburn, 117 Ariz. 300, 572 P.2d 128 (App. 1977).

⁶ State v. Gendron, 168 Ariz. 153, 812 P.2d 626 (1991).

⁷ State v. Schaaf, 169 Ariz. 323, 819 P.2d 909 (1991), denial of habeas corpus affirmed by Schaaf v. Lewis, 59 F.3d 176 (9th Cir. 1995), cert. denied, 516 U.S. 1129, 116 S.Ct. 948, 133 L.Ed.2d 873 (1996).

⁸ State v. Henley, 141 Ariz. 465, 470, 687 P.2d 1220, 1225 (1984); State v. Schaaf, 169 Ariz. at 333, 819 P.2d at 919.

⁹ State v. Lautzenheiser, 180 Ariz. 7, 881 P.2d 339 (1994).

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Recently, in Schaaf, after the defendant neither presented any witnesses nor testified himself, the trial judge commented to the jury that the evidence portion of the case had concluded earlier than he had expected.¹⁰ Although a judge's comment on a defendant's failure to testify is constitutionally impermissible¹¹, the court noted that it is only impermissible if "the language used was manifestly intended or was of such a character that the jury would naturally and necessarily take it to be a comment on the failure to testify."¹² Thus, because the trial ended three weeks earlier than the time set out by the judge to the jury at the outset of trial, the court concluded that a jury would not naturally and necessarily interpret the statement as a comment on the defendant's failure to testify, and that it would have been unreasonable to do so.¹³ Rather, "it was merely a statement that the case was concluding earlier than anticipated [and] we do not find the comment to be improper because it is not related to defendant's failure to testify."¹⁴

In the present case, the trial judge told the jury that he expected the trial to last two days.¹⁵ Considering this fact in light of the judge's comments to the jury, this Court concludes that the remarks were not of such a character that the jury would naturally and necessarily develop an animosity towards Appellant, thereby prejudicing her case. Like Schaaf, the comments reflected the judge's reaction to a potential change in the length of the trial, not distaste for the Appellant or her counsel for such delay. There is nothing in the record that indicates the judge blamed Appellant for the 25 minute delay. In addition, I cannot find that the Appellant's own actions had anything to do with the witness's failure to show up. Furthermore, the judge allowed the witness to testify the following day and there is no indication that the judge was unduly hard on the witness or biased towards the defense. Therefore, this Court concludes that the judge's comments did not amount to a fundamental error, and by failing to object to the remarks at trial, Appellant has waived the right to object on appeal.¹⁶

Even if this Court finds an error had been committed, reversal of the conviction is not required if the error is found to be harmless.¹⁷ "A constitutional error is harmless if it can be said beyond a reasonable doubt that the error did not alter the verdict of the jury."¹⁸ In State v. White¹⁹, the Arizona Supreme Court held that the trial judge's fundamental error in commenting on the defendant's failure to testify did not require a reversal in conviction because the judge

¹⁰ State v. Schaaf, 169 Ariz. at 332, 819 P.2d at 918.

¹¹ State v. Mata, 125 Ariz. 233, 609 P.2d 48 (1980), cert. denied, 449 U.S. 938, 101 S.Ct. 338, 66 L.Ed.2d 161 (1980); see also A.R.S. Section 13-117(B).

¹² State v. Schaaf, 169 Ariz. at 333, 819 P.2d at 919, quoting State v. Fuller, 143 Ariz. 571, 575, 694 P.2d 1185, 1189 (1985).

¹³ State v. Schaaf, 169 Ariz. at 333, 819 P.2d at 919.

¹⁴ Id.

¹⁵ RT p. 46.

¹⁶ State v. Thomas, 130 Ariz. at 435, 636 P.2d at 1217; Allied Van Lines v. Parsons, 80 Ariz. at 95-96, 293 P.2d at 434-35; Hurvitz v. Coburn, 117 Ariz. at 304, 572 P.2d at 132.

¹⁷ State v. Henley, 141 Ariz. 465, 468, 687 P.2d 1220, 1223 (1984); State v. Sorrell, 132 Ariz. 328, 645 P.2d 1242 (1982).

¹⁸ State v. Hein, 138 Ariz. 360, 365, 674 P.2d 1358, 1363 (1983).

¹⁹ 115 Ariz. 199, 564 P.2d 888 (1977).

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cured his error by giving proper instructions to the jury. Here, the judge also cured any possible error by instructing the jury to base it's verdict solely on the evidence, and not be influenced by sympathy, prejudice, or anything the judge may have said or done that would indicate Appellant was either guilty or not guilty.²⁰ Furthermore, Appellant's contention that the jury would develop animosity against her for "abusing their time" is diminished by the fact that the trial did not exceed the 2-day limit the jury had expected. Although jury members may be upset about having to spend an extra day in court, I do not believe that they would be upset when the trial concludes on time, especially given that they were let out early on the first day of trial. Therefore, assuming arguendo that the comments were made in error, this Court concludes that they would have been harmless and did not, beyond a reasonable doubt, alter the jury's verdict.

IT IS THEREFORE ORDERED affirming the judgment of guilt and sentence of the Phoenix Municipal Court.

IT IS FURTHER ORDERED remanding this matter back to Phoenix Municipal Court for all further and future proceedings in this case.

/S/ HONORABLE MICHAEL D. JONES

JUDICIAL OFFICER OF THE SUPERIOR COURT

²⁰ RT p. 48, 312-313.
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